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No. 90-1690

In The

Supreme Court of the United States

October Term, 1990

OLIVER M. BOND and HERTA R. BOND,

Petitioners,

vs.

OCTAGON PROCESS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT

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RESTATED QUESTIONS PRESENTED FOR REVIEW

1. Whether the case was properly dismissed for lack of *in personam* jurisdiction because petitioners failed to establish the existence of sufficient contacts between respondent and the forum State of Georgia.

2. Whether, in the absence of *in personam* jurisdiction over the respondent, the case was properly dismissed rather than transferred pursuant to 28 U.S.C. § 1406(a) where petitioner never requested or raised the transfer issue to the District Court?

LIST OF COMPANIES PURSUANT TO RULE 28.1

Respondent Octagon Process, Inc. ("Octagon") has no parent company, subsidiaries or affiliates.

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Georgia in this case has been published in 745 F. Supp. 710 (M.D. Ga. 1990). On March 28, 1991, the Eleventh Circuit Court of Appeals affirmed the judgment of the District Court based upon the reported opinion of the District Court. The opinion

of the Eleventh Circuit has been published in 926 F.2d 1573 (1991).

COUNTERSTATEMENT OF THE CASE

On December 5, 1982, petitioner Oliver M. Bond was on active duty with the National Guard at the Elberton Armory, in Georgia. Petitioner claims to have been injured while he was using a solvent to clean National Guard vehicles at the Armory. The cleaning solvent used by petitioner was allegedly manufactured by respondent Octagon Process, Inc. ("Octagon"), pursuant to government contract and under government specifications and supervision.

On May 7, 1987, petitioner Oliver Bond filed his complaint in the United States District Court for the Middle District of Georgia seeking damages for personal injuries sustained to his hands as well as for hospital and medical expenses. His wife, Herta Bond, also sued for damages *per quod*. Petitioners alleged "that Mr. Bond's injuries were caused by the defendant's failure to provide adequate warnings of the dangers of exposure to solvents at low temperatures." *Bond v. Octagon Process, Inc.*, 745 F. Supp. 710, 711 (M.D. Ga. 1990).[1]

Octagon is a New Jersey corporation which manufactured a certain cleaning solvent pursuant to a detailed military specification (MIL-C-11090D) and government contract therefor. No contacts or connections between Octagon and the forum State of Georgia were shown by petitioners nor was any evidence presented that Octagon ever conducted any business in the State of Georgia. As succinctly stated by the District Court:

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1. It is undisputed that petitioner, Oliver M. Bond, never read the warning label contained on the solvent labels, which specifically warned against contact with skin (Dep. of Oliver M. Bond, 9/30/88, pp. 23-20 to 28-24).

> Octagon Process, the defendant, is a New Jersey corporation with no offices, employees, agents or other personal contacts with Georgia. Octagon has no agent for service of process in Georgia and has never sought approval from the state of Georgia to do business there.
>
> At its plant in New Jersey, the defendant manufactures the solvent in question pursuant to a government contract. The solvent is made according to specifications issued by the government; Octagon did not develop or alter the formula supplied by the government. A government inspector stationed at the defendant's plant supervised the manufacturing process and had the authority to set aside any shipment that failed to conform to the specifications before it left the premises. The solvent was made for sale to the United States only and has never been sold to any private purchaser. At the time of the injury, Octagon was the only approved supplier of the solvent.

Bond v. Octagon Process, Inc. 745 F. Supp. at 711.

On June 14, 1989, Octagon filed a motion to dismiss the case and/or for summary judgment based on three theories which included: (1) lack of personal jurisdiction; (2) that even if personal jurisdiction existed, Octagon would be put to an unreasonable hardship if it had to defend in Georgia; and (3) that the government contractor defense applied and shielded Octagon from liability.[2]

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2. The courts below never reached the second and third issues because of their decisions on the jurisdictional issue.

In a published decision issued on September 19, 1990, the District Court dismissed petitioners' case on two grounds. First, the District Court concluded that Octagon was not amenable to suit under the Georgia long-arm statute. Second, the District Court concluded that Octagon could not be subject to suit in Georgia consistent with federal constitutional due process requirements because petitioners had failed to establish sufficient minimum contacts between Octagon and the forum State of Georgia.

The District Court analyzed the Georgia long-arm statute and concluded that respondent was not subject to the Georgia long-arm statute. *Bond v. Octagon Process, Inc., supra,* 745 F. Supp. at 712. The District Court stated as follows:

> It is undisputed that Octagon has no direct ties with Georgia, as noted above. The deposition of Mr. Lee Leibmann, Octagon's president, indicates that the defendant shipped the solvent in question to various government depots around the country, after which the government sent it to where it was needed. (Depo. pp. 22-24.) Thus, the defendant shipped the product to an independent distributor who then controlled where it was ultimately sent. This is the closest contact Octagon has ever had with Georgia, and it simply does not qualify as "a transaction with or in the forum."

Id. The District Court concluded that this conduct did not constitute the purposeful doing of some act or consummation of some transaction with or in the forum state as required by the long-arm statute. *Id.*

The District Court next turned to federal constitutional due process requirements as an alternative basis for its decision and concluded that Octagon did not have the requisite "minimum

contacts" with the forum State of Georgia. *Id.* at 712. The court undertook a comprehensive review of Supreme Court decisions regarding "minimum contacts" and concluded that established Supreme Court precedent required that there be some act of the defendant purposely directed to the forum state. *Id.* at 713. The District Court concluded that it could not exercise personal jurisdiction over Octagon, and stated that:

> Even assuming that the plaintiffs are correct when they claim that Octagon knew its product would eventually enter Georgia . . ., *Asahi* has made it clear that this is simply not enough to form sufficient minimum contacts so that Octagon could foresee being haled into court here. The record reveals no other act by the defendant purposefully directed toward Georgia as required by *Asahi*. When Octagon sold the solvent to the Department of Defense, which acted as an independent distributor, it merely placed its product into the stream of commerce, an act which alone will not allow this court to exercise personal jurisdiction in Georgia.

Id. at 713-714.

Petitioners appealed the District Court's decision to the Eleventh Circuit Court of Appeals. The issue of *in personam* jurisdiction was briefed at length, as was the newly raised issue of whether the District Court should have *sua sponte* transferred the case to the District of New Jersey. The Court of Appeals heard oral argument on March 6, 1991 and on March 28, 1991, affirmed the decision of the District Court based upon the reported opinion below.

SUMMARY OF OCTAGON'S OPPOSITION TO BONDS' PETITION FOR CERTIORARI

Petitioners have not presented this Court with any substantial issue meriting review. The District Court's dismissal of the case due to lack of *in personam* jurisdiction over the respondent Octagon, was affirmed by the Eleventh Circuit on the basis of the District Court's dispositive, reported decision. The District Court's decision is in accord with Supreme Court jurisprudence and does not conflict with any decision by this Court. The decision below is not in conflict with the decision of any other Circuit Court of Appeals, and it does not in any other way call for the exercise of this Court's supervisory powers. In addition, the courts below did not err by dismissing this case rather than transferring the case to New Jersey where petitioners failed to request such relief from the District Court.

ARGUMENT

I.

THE COURTS BELOW PROPERLY DISMISSED THE CASE FOR LACK OF *IN PERSONAM* JURSDICTION BECAUSE PETITIONERS FAILED TO ESTABLISH SUFFICIENT CONTACTS BETWEEN RESPONDENT OCTAGON AND THE FORUM STATE OF GEORGIA.

The evolution of the due process standards that guide courts in determining whether a defendant is amenable to *in personam* jurisdiction in a particular forum has been set forth in the reported decision of the District Court, and need not be repeated at length herein. The primary consideration in the jurisdictional inquiry is that of fundamental fairness to the defendant. As the facts of this case make clear, the lower courts correctly dismissed this case because petitioners had failed to establish sufficient, if any,

contacts between Octagon and the forum State of Georgia.

A. The Georgia Long-arm Statute Provides an Independent and Adequate Basis for the Decision of the Lower Courts.

It is fundamental that the Court need not reach a constitutional issue where the case can be decided on some other grounds, such as statutory construction or general law. *United States v. Wells Fargo Bank,* 485 U.S. 351, 354, 108 S. Ct. 1179, 99 L. Ed. 2d 368 (1988). The lower courts applied a two-step analysis in determining whether the Georgia long-arm statute conferred jurisdiction over Octagon.[3]

The Georgia long-arm statute, O.C.G.A. § 9-10-91, provides in pertinent part:

> A court of this state may exercise personal jurisdiction over any non-resident or his executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he: . . .
>
> (3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed

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3. "First, it must be decided whether the defendant is amenable to suit under the state statute, as determined by the law of the state. Next, if the first step is met, the court must decide whether the assertion of jurisdiction over the defendant meets federal due process requirements." *Bond v. Octagon Process, Inc., supra,* 745 F. Supp. at 711, citing *DeLong Equipment Co. v. Washington Mills Abrasive Co.,* 840 F.2d 843 (11th Cir. 1988).

or services rendered in this state;

* * *

The lower courts applied a three-element test to determine if Octagon was subject to the reach of the Georgia long-arm statute.[4] This test was set forth in *Schellenberger v. Tanner,* 138 Ga. App. 399, 404-05, 227 S.E. 2d 266, 273 (1976) and was cited with approval by the Supreme Court of Georgia. *Smith v. Smith,* 254 Ga. 450, 330 S. Ed. 2d 706 (1985); *see DeLong,* 840 F.2d at 849.

The lower courts concluded that the first element of the *Schellenberger* test was not met. The District Court concluded as follows:

> The court is not satisfied that the first part of the *Schellenberger* test has been met in this case. It is undisputed that Octagon has no direct ties with

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4. The three elements of the test are as follows:

1. The non-resident has purposefully done some act or consummated some transaction with or in the forum (but the actual act or omission resulting in the injury here need not have occurred in this state). The defendant need not be physically within the forum when this act or transaction occurs and a single such instance may suffice;

2. The Georgia plaintiff must have a legal cause of action in tort against the non-resident, which arises out of, or results from, the purposeful activity of the defendant involving this state; a resident is the victim of a "tortious act" when he suffers an injury here due to an act or omission of negligence occurring outside this state; and

3. If the requirements of (1) and (2) are satisfied, the exercise of jurisdiction over the non-resident must be "reasonable."

> Georgia, as noted above. The deposition of Mr. Lee Leibmann, Octagon's president, indicates that the defendant shipped the solvent in question to various government depots around the country, after which the government sent it to where it was needed. (Depo. pp. 22-24.) Thus, the defendant shipped the product to an independent distributor who then controlled where it was ultimately sent. This is the closest contact Octagon has ever had with Georgia, and it simply does not qualify as "a transaction with or in the forum." *Schellenberger,* 227 S.E.2d at 273.

Bond v. Octagon Process, Inc., supra, 745 F. Supp. at 712.

Thus, the District Court concluded that the Georgia long-arm statute did not permit Georgia to assert personal jurisdiction over Octagon. Based upon this holding, the District Court need not have gone further to discuss due process requirements. Because the Georgia long-arm statute furnishes adequate state statutory grounds for the denial of personal jurisdiction over Octagon, this Court need not and should not reach the federal constitutional due process arguments of petitioners.

B. Established Supreme Court Precedent Fully Supports the Decision of the Lower Courts.

The due process clause of the Fourteenth Amendment protects an individual's liberty interest by ensuring that an individual is not subject to a binding judgment in a forum with which the individual has established no meaningful "contacts, ties, or relations." *International Shoe Co. v. Washington,* 326 U.S. 310, 319, 66 S. Ct. 154, 90 L. Ed. 95 (1945). The due process clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some

minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980).

In *International Shoe Co. v. Washington, supra,* 326 U.S. at 316, the Supreme Court held that:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain [1] minimum contacts with it such that the maintenance of the suit does not offend [2] "traditional notions of fair play and substantial justice." quoting *Milliken v. Meyer,* 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940).

In *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958) this Court further refined its due process analysis by stating that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." The purposeful availment requirement ensures that a defendant will not be haled into a distant state solely as a result of "random, isolated or fortuitous" contacts, *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 774, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984) or because of the "unilateral activity of another party or a third person." *Helicopteros Nacionales de Colombia v. Hall,* 466 U.S. 408, 417, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984).

To satisfy the test of minimum contacts, the plaintiff is obligated to carry the burden of proving that the defendant has purposefully availed himself of the privilege of conducting activities within the forum state thereby invoking the benefits and

protections of its law, and that defendant's conduct and connection with the forum state are such that the defendant should anticipate being haled into the forum court. *Hanson v. Denckla, supra,* 357 U.S. at 253; *Kulko v. California Superior Court,* 436 U.S. 84, 97-98, 98 S. Ct. 1690, 56 L. Ed. 2d 132 (1978). This Court has repeatedly emphasized that the *purposeful* nature of the defendant's conduct targeted or directed at the forum by the defendant is the determinative factor, rather than mere foreseeability of the consequence or effect of the defendant's conduct. *Hanson v. Denckla, supra,* 357 U.S. at 253; *World-Wide Volkswagen Corp. v. Woodson, supra,* 444 U.S. at 297-98; *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 474, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985); *Asahi Metal Industry Co., Ltd. v. Superior Court of California,* 480 U.S. 102, 108-9, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987) (plurality opinion of Justice O'Connor).

The petitioners failed to carry their burden in this case. Thus, the conclusion of the lower courts that Octagon performed no activity purposely directed toward the forum State of Georgia: (1) is supported by the record below; (2) complies with established due process principles; and (3) does not support a grant of certiorari.

C. The Decision in *World-Wide Volkswagen v. Woodson,* 444 U.S. 286 (1980) Is Dispositive of this Case.

In *World-Wide Volkswagen, supra,* two New York residents brought a products liability suit in an Oklahoma state court against numerous defendants, including a New York automobile retailer who sold the plaintiffs an allegedly defective car. The suit arose following an automobile collision on an Oklahoma highway which occurred while plaintiffs were travelling to their new home in Arizona. Plaintiffs based their argument for jurisdiction on the theory of actual foreseeability. Due to the highly mobile nature of motor vehicles, the plaintiffs argued that the defendants should

have foreseen the possibility that their automobile would be used in another state and cause injury there.

The Court rejected plaintiffs' actual foreseeability theory. The Court clearly and specifically concluded that foreseeability alone was not a proper basis for personal jurisdiction under the due process clause, for thus every seller of chattels would in effect appoint the chattel as his agent for service of process. *World-Wide Volkswagen, supra,* 444 U.S. at 296. The Court stated that although:

> foreseeability is [not] wholly irrelevant . . . the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into Court there. (citation omitted) The Due Process Clause, by ensuring the "orderly administration of the laws," (citation omitted) gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.
>
> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," (citation omitted) it has clear notice that it is subject to suit there . . . .[5]

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5. Significantly, the Court noted that absent some "purposeful availment" by the defendant corporation of the " 'privilege[s] of conducting activities with the forum State,' " due process does not permit the assertion of personal (Cont'd)

Id. at 297. The Court further explained that foreseeability is relevant to personal jurisdiction only if the sale of a product of a manufacturer or distributor arises from the defendant's expectation and efforts to serve, directly or indirectly, the market in the forum rather than from an isolated occurrence of purchase. *Id.* Thus, unless a defendant delivers his product into the stream of commerce with the expectation that it will be purchased by consumers in the forum, it is unconstitutional and unreasonable to require that the non-resident defendant be compelled to defend a suit in the forum. *Id.*[6]

World-Wide Volkswagen did not overrule the "purposeful availment" standard set forth in *Hanson v. Denckla*. Instead, the Court refined the scope of the "minimum contacts" due process analysis by holding that the assertion of personal jurisdiction requires at least an effort to transact business, either directly or indirectly, in the forum state. Under *World-Wide Volkswagen*, it is such purposeful conduct of the defendant and not the location of the product which is determinative of the issue. Thus, *World-Wide Volkswagen* controls the disposition of this case because petitioners failed to establish the existence of any conduct by respondent which rose to the level of any effort to

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(Cont'd)
jurisdiction over nonresident defendants based on the "unilateral activity" of plaintiffs over which defendants exercise no control. *Id.* at 297 quoting *Hanson v. Denckla*, 357 U.S. at 253. There was a "total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction." *Id.* at 295.

6. The Court also rejected the argument that jurisdiction could be supported by the fact that the defendant enjoyed certain indirect benefits such as earning revenues from goods used in the forum state. *World-Wide Volkswagen*, 444 U.S. at 298-299. "[F]inancial benefits accruing to the defendant from a collateral relation to the forum state will not support jurisdiction" unless they stem from a "constitutionally cognizable contact" with that state. *Id.* at 299 quoting *Kulko v. California Superior Court*, 436 U.S. at 94-95.

transact any business, directly or indirectly, in the forum State of Georgia.

Although Octagon manufactured a solvent for the Department of Defense pursuant to government contract, and under the government's specifications and supervision, the record is devoid of any conduct of Octagon directed toward Georgia, either directly or indirectly. The record is absolutely clear that Octagon did not have any expectation or make any efforts, whatsoever, to market directly or indirectly the solvent in Georgia. Manifestly, the record demonstrates that Octagon did not deliver its product into the "stream of commerce" with the expectation that the solvent would be purchased by consumers in the State of Georgia. Accordingly, petitioner's reliance on the "stream of commerce" theory is misplaced under the facts of this case.

Although *World-Wide Volkswagen* explicitly rejected the concept that "mere foreseeability" was enough to subject a non-resident corporation to personal jurisdiction in the forum state, petitioners vainly seek to employ the "foreseeability" concept, albeit under the rubric of the "stream of commerce" theory, to attempt to subject Octagon to *in personam* jurisdiction in Georgia. The petitioners' argument is equivalent to the proposition that one's product becomes one's agent for service of process, a proposition squarely rejected by *World-Wide Volkswagen*.

Simply stated, petitioners are in error and *World-Wide Volkswagen* compels the conclusion that the case was properly dismissed for lack of personal jurisdiction. The lower courts focused upon Octagon's conduct and connection with Georgia and properly concluded that Octagon was not amenable to suit in Georgia. Further, because this case does not involve a sale of a product to a consumer, *World-Wide Volkswagen* also compels the conclusion that Octagon is not subject to personal jurisdiction in the State of Georgia. Moreover, the unilateral conduct of the

United States government in controlling the destination of the product defeats petitioners' allegation of personal jurisdiction over Octagon. *Helicopteros Nacionales, supra.*

D. *Asahi* Does Not Control the Disposition of this Case.

Petitioners rely heavily upon the case of *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987). In *Asahi,* a Japanese supplier sold tire valves to a Taiwanese manufacturer, knowing that some of the valves would be assembled in Taiwan into tires bound for sale in the United States. The plaintiff suffered injury from a defective tire and filed suit in California against the tire manufacturer. The manufacturer cross-claimed against the Japanese supplier for indemnification.

Although the Supreme Court was unable to agree on the appropriate parameters of "minimum contacts" under the facts of the case, the Court unanimously agreed that it would be unreasonable to hold the Japanese supplier amenable to personal jurisdiction in California under the second prong (*i.e.,* the reasonableness of exercising jurisdiction) of the *International Shoe* test. In Wright & Miller, *Federal Practice and Procedure: Civil 2d* § 1067 at 289 (1987), the authors succinctly analyze the voting split of the *Asahi* Court as follows:

> Although the Supreme Court agreed unanimously on other grounds that the California court's exercise of jurisdiction was unreasonable [under the second prong of the *International Shoe* test], Justice O'Connor, in a portion of her opinion for the Court that was joined only by the Chief Justice and Justices Powell and Scalia, also argued that jurisdiction could not be justified under the stream of commerce theory. She took the position that "[t]he placement of a product into the stream of

> commerce, without more, is not an act of the defendant purposefully directed toward the forum state." Rather, "additional conduct" indicating "an intent or purpose to serve the market in the forum state" also is necessary.[7]
>
> Justice Brennan, joined by Justices Blackmun, Marshall, and White, disagreed, arguing that a defendant properly may be subject to jurisdiction whenever "the regular and anticipated flow of products," as opposed to "unpredictable currents or eddies," leads the product to be marketed in the forum state.

In *Asahi* the Court decided the case based upon the second prong of the *International Shoe* two-part test, and arguably never had to reach the first prong of the *International Shoe* test (*i.e.*, minimum contacts). What is clear from *Asahi*, however, is that the mere fact that one's product finds its way into the forum state is insufficient in and of itself to sustain an assertion of *in personam* jurisdiction. Although Justice Brennan, joined by Justices White, Marshall and Blackmun was more willing to embrace a "stream of commerce" theory, he was unwilling to totally abandon the requirement that there be some transaction of business in the forum state. Justice Brennan's opinion was based upon the statement in *World-Wide Volkswagen* that jurisdiction might be proper where products are delivered into commerce "with the expectation that they will be purchased by consumers in the forum State." Justice Brennan focused on whether the defendant "is aware that the final product is being marketed in the forum State" because such a defendant "benefits economically from the retail sale of the final product in the forum

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7. This position comports with traditional Supreme Court jurisprudence and was adopted by the lower courts in this case.

State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity." *Asahi,* 480 U.S. at 117. Thus, the difference of opinion in *Asahi,* was largely whether due process requires that the defendant have somehow actively engaged, directly or indirectly, in commercial activity in the forum state or whether passive indirect benefits from a commercial transaction of others within the forum state are enough for the assertion of jurisdiction.

In applying *Asahi* to the present matter, it is clear that neither Justice O'Connor's plurality opinion nor Justice Brennan's concurring opinion support an assertion of *in personam* jurisdiction over Octagon because there was no commercial transaction in the forum State of Georgia.

E. There Is No Split of Opinion in the First, Fifth and Seventh Circuits.

Petitioners assert in conclusory fashion, and without explanation, that the Eleventh Circuit decision in this case is in conflict with certain decisions of the First, Fifth and Seventh Circuits. There is no "intolerable conflict" in either principle or outcome between the Eleventh Circuit's decision in this case and the decisions in the First, Fifth and Seventh Circuits cited by petitioners. The Circuit cases cited by petitioners consist of entirely different facts wherein the defendants (all alien corporations) maintained sufficient activities in or in connection with the forum state to support a finding of personal jurisdiction. In addition, these cases all involved sales of products by a manufacturer which were purposely directed to the forum state, unlike this case where the solvent was manufactured pursuant to government contract, specifications and supervision. Thus, all of the Circuit cases relied upon by petitioners are absolutely distinguishable, non-controlling and inapposite to this case.

Petitioners cite *Benitez-Allende v. Alcan Aluminio Do Brasil, S.A.*, 857 F.2d 26 (1st Cir. 1988), *cert. denied*, 489 U.S. 1018, 109 S.Ct. 1135, 103 L.Ed.2d 196 (1989), while conceding that the facts involved *direct marketing* by the defendant in the forum State (Pb at 18). The First Circuit held that a Brazilian manufacturer of pressure cookers was subject to personal jurisdiction in Puerto Rico. The First Circuit found that the Brazilian manufacturer sold hundreds of thousands of pressure cookers to persons in the United States and Puerto Rico; that the manufacturer knew and intended that Americans would use its cooker in commerce in America; and most importantly, that the manufacturer had taken active steps to directly market and sell its product in Puerto Rico, including the retention of a Florida "sales representative" who travelled to Puerto Rico to sell cookers at least four times a year. *Id.* at 29.

In *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383 (5th Cir.), *reh'g denied*, 872 F.2d 423, *cert. denied sub nom., Jugometal Enterprise For Import and Export of Ores and Metals v. Irving*, ____ U.S. ____, 110 S. Ct. 83, 107 L. Ed. 2d 49 (1989), the Fifth Circuit ruled that a Yugoslavian asbestos distributor was subject to the exercise of personal jurisdiction in Texas under the state's long-arm statute. The Fifth Circuit held that the asbestos distributor was subject to personal jurisdiction in Texas where it held itself out as a seller in a contract to supply asbestos to an American company-broker in Texas; conveyed the asbestos to a freight forwarder for shipment to Texas; shared the cost of quality control testing done by a Texas laboratory; received debits for the shipping bag-cleaning charges of another Texas company; and accepted payments for the asbestos and stored it in Texas. *Id.* at 386. The Fifth Circuit concluded that these direct and substantial actions by the Yugoslavian asbestos distributor with the forum State of Texas satisfied the minimum contacts prong of the due process test, and thus subjected the Yugoslavian asbestos manufacturer to personal jurisdiction in Texas. *Id.*

In *Gulf Consol. Services v. Corinth Pipeworks, S.A.*, 898 F.2d 1071 (5th Cir.), *cert. denied*, ____ U.S. ____, 111 S. Ct. 256, 112 L. Ed. 2d 214 (1990), the Fifth Circuit, in a 2 to 1 decision, held that a Greek oil field casing manufacturer, which directly marketed its product in Texas, was subject to personal jurisdiction in Texas. The majority opinion concluded that, "a Greek oil field casing manufacturer, licensed by a Texas-based organization which allows the [Greek] manufacturer to warrant conformity with certain set [American Petroleum Institute ("API")] standards, was properly haled into court in Texas to answer a claim that its products failed to conform to those standards." *Id.* at 1072. The Fifth Circuit concluded that the exercise of personal jurisdiction was appropriate where the Greek manufacturer sold and shipped oil casings to a Texas importer; the Greek manufacturer had a license agreement with another Texas organization to sell API specification pipe; the Texas importer relied on the Greek manufacturer's warranty that the casing was manufactured in accordance with API specification; the Greek manufacturer's sole market was Texas; the Greek manufacturer's representatives frequently called on customers in Texas; and the Greek manufacturer, "was the charterer of the vessels which carried the casing shipments from Greece to Houston." *Id.* at 1074. Circuit Judge Rearley dissented and expressed the opinion that in the subject *contract* case, the Greek manufacturer had not attempted to exploit the Texas market and that the Texas courts did not have personal jurisdiction under either prong of the personal jurisdiction test.

In *Mason v. F. LLI Luigi & Franco Dal Maschio Fu G.B. s.n.c.*, 832 F.2d 383 (7th Cir. 1987), the Seventh Circuit held that an Italian partnership that manufactured a broom flagging machine which injured a worker, was subject to personal jurisdiction in Illinois under the state's long-arm statute. The machine was manufactured by an Italian partnership, F. Lli Luigi

and Franco Dal Maschio Fu G.B. s.n.c. ("Dal Maschio"), in Italy. The machine was sold by Dal Maschio to Werner Petzold & Co. ("Petzold") in Maryland. In turn, Petzold sold the machine to the Libman Broom Company in Illinois, where the worker was injured. The Seventh Circuit concluded that Dal Maschio had had sufficient minimum contacts to subject it to personal jurisdiction in Illinois:

> In this case, Dal Maschio made the machine involved in the accident and similar machines especially for Libman, and one of its employees visited Libman in Illinois several times to show how to set up, operate and service the machines and to teach its personnel. Dal Maschio knew that the machines were custom-made for an Illinois manufacturer, *viz.*, Libman, even though shipped and billed to Werner Petzold & Co. in Maryland. Werner Petzold was in fact its export manager rather than an independent distributor. The injury occurred to an Illinois resident in Illinois, and Illinois has an interest in having that injury fully rectified.

Id. at 386.[8]

The Circuit cases cited by petitioners do *not* present a conflict with the decision of the Eleventh Circuit in this case. All of the

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8. The Seventh Circuit stated that, "[l]ike the example used in *World-Wide Volkswagen* to show where personal jurisdiction would be proper, this defendant delivered its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state. 444 U.S. at 297-98, 100 S.Ct. at 567-68. In addition, it purposely availed itself of the privileges of conducting activities within the forum state through its own employee and also its export manager Werner Petzold." *See* 444 U.S. at 297, 100 S. Ct. at 587. *Mason,* 832 F.2d at 386.

Circuit cases cited by petitioners involved direct and purposeful acts taken by foreign manufacturers to avail themselves of a defined market within the United States. Petitioners' allegation of a conflict among the Circuits is therefore meritless.[9]

II.

THE ELEVENTH CIRCUIT DID NOT COMMIT ERROR BY DISMISSING THE CASE RATHER THAN TRANSFERRING THE CASE TO NEW JERSEY PURSUANT TO 28 U.S.C. § 1406(a), WHERE PETITIONERS NEVER REQUESTED OR RAISED THE TRANSFER ISSUE TO THE DISTRICT COURT.

Petitioners assert that the lower courts erred by dismissing this case, rather than *sua sponte* transferring the case to the District Court for New Jersey. Petitioners claim error for their self-inflicted failure to raise and present the transfer issue to the District Court. Significantly, petitioners *never* raised this issue to the District Court by motion, opposition brief, pleading or otherwise. Petitioners noted the issue for the first time before the Eleventh Circuit after their "all or nothing" tactic before the District Court proved to be unsuccessful. The Court of Appeals declined to find error based on the record before it.

The exercise of discretion by the courts below is not an issue which merits the grant of a writ of certiorari. It does not effectuate a change in the law which will have an impact on other litigants, nor does it present an issue which calls for a pronouncement from

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9. Petitioners' conclusory allegation in their Petition for Writ of Certiorari that the decision in this case is contrary to *Morris v. S.S.E. Inc.*, 843 F.2d 489 (11th Cir. 1988) is without merit. The Eleventh Circuit has consistently applied the *Asahi* "purposeful availment" plurality standard. *See, Morris v. S.S.E., Inc. supra; Madara v. Hall*, 918 F.2d 1510 (11th Cir. 1990) (not cited by petitioners) and *Bond v. Octagon Process, Inc., supra.*

the Supreme Court of the United States. The decision of the District Court has already been reviewed by the Eleventh Circuit and found to have been proper.

Petitioners first raised the issue of transfer in their appeal to the Eleventh Circuit. The Eleventh Circuit declined to reverse the District Court because petitioners had failed to raise the issue below. *See Hormel v. Helvering,* 312 U.S. 552, 556, 61 S. Ct. 719, 85 L. Ed. 1037 (1941) ("Ordinarily an appellate court does not give consideration to issues not raised below."). Similarly, petitioners' reliance on *Goldlawr v. Heiman,* 369 U.S. 463, 82 S. Ct. 913, 8 L. Ed. 2d 39 (1962) was apparently deemed misplaced by the Eleventh Circuit, in view of petitioners' failure to raise the issue with the District Court, despite ample opportunity to do so.[10]

Petitioners also rely on 28 U.S.C. § 1406(a), which provides that:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought . . . .

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10. Petitioners' argument that they would have lost their right to appeal the personal jurisdiction issue by moving before the District Court for transfer of the case is incorrect. Petitioners could have preserved their right to appeal the personal jurisdiction issue by, *inter alia,* seeking the alternative relief of a transfer and a stay of that transfer pending the outcome of appellate review on the personal jurisdiction issue. In the alternative, after the District Court decided the personal jurisdiction issue, petitioner could have sought reconsideration on the issue of transfer or sought relief pursuant to F. R. Civ. P. 60. They elected to pursue only this appeal, and should not be heard to complain when their election was unwise. The lack of a transfer was thus petitioners' error, not the District Court's error.

The statute directs a District Court to dismiss a case as the primary form of relief. There are no facts in the record below indicating that transfer as opposed to dismissal is in the interests of justice. Since petitioners never raised the issue of transfer to the District Court, the District Court did not commit any error or abuse of discretion by applying the plain language of the statute. *See United States v. Wright Motor Co., Inc.*, 536 F.2d 1090, 1093-94 (5th Cir.), *reh'g. denied*, 542 F.2d 576 (5th Cir. 1976)[11] ["If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." quoting *Lines v. Falstaff Brewing Co.*, 233 F.2d 927, 933 (9th Cir.), *cert. denied*, 352 U.S. 893, 77 S. Ct. 129, 1 L. Ed. 2d 88 (1956)]. Indeed, none of the cases cited by petitioners supports the proposition that a failure to transfer, *sua sponte*, constitutes error of any sort. For these reasons, the lower courts did not err in dismissing the case.

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11. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

CONCLUSION

For the reasons presented herein, it is respectfully urged that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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